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Supreme Court of the United States

October Term, 1968

No. [redacted] 55

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

ALFRED COLES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENTS OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRELIMINARY STATEMENT

C. C. Peyton, Superintendent of the Virginia State Penitentiary prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit of January 8, 1968, in the case of Alfred Coles v. C. C. Peyton, Superintendent of the Virginia State Penitentiary. On January 29, 1968, the United States Court of Appeals for the Fourth Circuit, upon application of the Superintendent, stayed the mandate, in order that certiorari could be sought in the premises.

OPINIONS BELOW

The memorandum opinion of the Judge of the Hustings Court of the City of Richmond of May 21, 1965, is not reported, but will be found in Appendix I to this brief.

The order of the Hustings Court of the City of Richmond of July 8, 1965, dismissing the petition, after a hearing, is not reported and will be found in Appendix II to this brief.

The order of the Supreme Court of Appeals of Virginia of March 8, 1966, denying the petition for a writ of error, is not reported and will be found in Appendix III to this brief.

The order and opinion of the United States District Court for the Eastern District of Virginia, Richmond Division of July 7, 1966, are not reported, but will be found as Appendix IV to this brief.

The opinion of the court below is not at the time of the filing of this petition reported, and the same will be found in Appendix V to this brief.

THE JUDGMENT

On January 29, 1968, an order was entered in the United States Court of Appeals for the Fourth Circuit staying the issuance and transmission of its mandate in the premises to permit the Superintendent of the Virginia State Penitentiary to seek a writ of certiorari from this Court.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in the premises is grounded upon the provisions of Section 1254(1), Title 28 U.S.C.

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit Err in Holding That in a Habeas Corpus Proceeding Involving a State Prisoner the Burden of Proof Changes, Requiring the Commonwealth to Prove Certain Facts, Which Could Have Been Proven by the Petitioner, If He Had Deemed Them Pertinent?

STATUTE INVOLVED

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928." (28 U.S.C., Section 1254)

STATEMENT OF THE CASE

On May 25, 1963, a warrant was issued charging Alfred Coles with rape. Thereafter, at the June 1963 Term of the Grand Jury of the Hustings Court of the City of Richmond, an indictment was returned charging Coles with rape. The date upon which counsel were appointed to represent

Coles is not clear from the record, as no order was entered specifically appointing counsel in this case. In the City of Richmond, a semi-public defender type of system is employed, and counsel are appointed to serve for several terms. Nevertheless, on June 11, 1963, on motion of the public defender appointed to represent Coles, he was committed to Central State Hospital at Petersburg, Virginia, for observation and report as to his mental condition. A report was thereafter filed by Dr. Milton H. Khibbe, Superintendent of the Central State Hospital. On August 6th, an order was entered, directing that he be returned to Richmond to stand trial. Another order was entered along the same lines on August 29, 1963.

On September 18, 1963, he entered a plea of not guilty, waived trial by jury, was tried by the Court, found guilty, and the matter was referred for a presentence report. On November 27, 1963 Coles was sentenced to serve a term of twenty-five years in the penitentiary by the Judge of the Hustings Court of the City of Richmond, Virginia. He is presently detained pursuant to that judgment.

Raymond H. Dupuy and Robert J. Smith were public defenders at the time that an indictment was returned against Coles, charging him with rape. As hereinbefore pointed out, it is not clear when they were appointed to represent him, but he was represented by counsel at the time of the commitment for mental observation.

Dupuy, who actually represented him at his trial, has been engaged in the practice of law since 1930. He was called as a witness on behalf of Coles at the plenary hearing held in the State court and was examined very carefully as to the length of time the first conference which he had with his client consumed. He could not state the length of time but testified, "I can't say other than to say

we took all the time we thought necessary" (Tr. 9). He testified relative to the facts of the offense as follows: "We went into all details." He saw his client once again at the City Jail and then again prior to trial at the courthouse. Dupuy testified as a witness for the petitioner that the question of a medical examination of the prosecutrix was never discussed (Tr. 13-14).

Again testifying as a witness on behalf of Coles, Dupuy stated that Coles admitted to him that he had intercourse with the prosecutrix. His version was that the argument was over whether or not he was to pay before or afterwards for the woman's favor (Tr. 18). Dupuy had complete notes of his interview with the petitioner, and his testimony as to Coles' story is fully set forth below:

> "All right, he said that he was standing on the corner, I think, Sixth and Clay or Leigh, about 8:30 at night, and a man and woman came down the street. The man walked over to him and said 'I have got a woman here you can get for two dollars, do you want her?' He looked her over and decided he would pay two dollars, and they went down the alley. He said they got in an argument, whether he would pay before or pay after. He wanted to pay after. This was a blind alley. There was a woman that lived in a house by the alley who heard screams, she testified. She heard a woman holler 'just please turn me loose and I will give you my money,' and she called the police. The police arrived and the police testified that he came running out towards the street because he couldn't go the other way, it was a blind alley, with his trousers open in front and his privates—he was puffing and running as far as he could take off. Now, the woman testified that she was coming down the street walking alone and he grabbed her and dragged her in the alley and she screamed and said 'I will give you all of my money if you will just

turn me loose.' I cross-examined her from every angle that I could, as well as the woman who called the police, and the officers. He got on the stand and told his side of it." (Tr. 20-21).

Dupuy pointed out that it was purely a question of fact as to whether or not the rape actually took place (Tr. 26). Dupuy testified that he did not know of the existence of a medical report which did not show the presence of semen. This, of course, in and of itself would not prove the lack of penetration. He indicated that he thought the report would have been helpful in cross-examination (Tr. 37).

Robert J. Smith, the other public defender, who did not actually represent Coles at the time of his trial testified that he did interview Coles at the City Jail on several occasions (Tr. 39), and that the interviews were of sufficient length to prepare the case for trial (Tr. 40).

Coles testified at the hearing in the Hustings Court of the City of Richmond, but gave no other story than that testified to by his attorney.

The Hustings Court of the City of Richmond found that the petitioner had not carried the burden, and this was affirmed by the Supreme Court of Appeals of Virginia. The District Court dismissed the petition, and this case was reversed by the United States Court of Appeals for the Fourth Circuit.

SUMMARY OF ARGUMENT

The Superintendent will demonstrate that the court below has ignored an established principle of law in reaching its decision in the premises. This Court has previously and repeatedly held that the burden in a habeas corpus proceeding is upon the prisoner to prove his case by a preponderance of the evidence. The court below has discarded

this rule of law and required the Commonwealth to prove facts which, if pertinent, could and should have been proved by the prisoner in carrying his burden. For these reasons, it is submitted that the judgment should be reversed.

ARGUMENT

The Court Erred in Holding That in a Habeas Corpus Proceeding the Burden of Proof Shifts and the Commonwealth is Required to Offer in Evidence Facts Which Are Available to the Prisoner and Can Be Proven by Him If He Deems Them Pertinent.

The status of the case is as follows. The prisoner was granted a full and complete plenary hearing in the Hustings Court of the City of Richmond, which court, after carefully considering the evidence, ruled against the petitioner's contentions. This was affirmed by the Supreme Court of Appeals of Virginia, and the United States District Court thereafter denied the prisoner's petition for a writ of habeas corpus. The case was then heard based on the State court record by the United States Court of Appeals for the Fourth Circuit, which court reversed the judgment of the District Court and ordered the prisoner's release. In doing so, it changed the burden of proof, requiring the Commonwealth to prove the previous chaste character of the prosecutrix. In doing this, however, it did not grant the prisoner or the Commonwealth a plenary hearing on this point, but simply held that since such evidence had not been produced at the State court hearing, the writ would now issue.

This decision is contrary to several decisions of this Court on this very point. First, however, let us briefly examine the opinion of the United States Court of Appeals for the Fourth Circuit. A review of the same will show that it is not supported by the record.

The court points out that counsel was not appointed until August 20, 1963, almost three months after Coles'

arrest. This is not true, for the reason that counsel was appointed and was present on June 11, 1963, some two and one-half weeks after the prisoner's arrest, when he was ordered committed for observation as to his mental condition.

It is true that the two public defenders were appointed to represent some fifty-seven other defendants at the term of court in question. This is true; however, the Fourth Circuit neglects to point out that this occurred over a period of some three months. Assuming that the burden was equally divided, each attorney had approximately 28 or 29 criminal cases to try over that period of time. This statement of the Fourth Circuit is, therefore, not supported by the record. The testimony of Dupuy, the attorney who represented Coles, was that Coles had told him that he had had intercourse with the woman, and this testimony is uncontradicted.

Admittedly, counsel made no investigation of the reputation of the prosecutrix for chastity. Moreover, counsel appointed to represent Coles in the State court made no attempt to prove her reputation at the time of the habeas corpus proceeding. Here, it is quite clear that the Fourth Circuit ignored its own opinion in *Horne* v. *Peyton,* 356 F. 2d 631 (4th Cir., 1966). The Court pointed out in the cited case that the prisoner had failed to show that the failure of his attorney to make a specific investigation of all the court records pertaining to his previous convictions prior to his trial as a recidivist did not invalidate his sentence. The Court emphasized that no evidence had been introduced to show that such an investigation would have produced any result or any information which would have been of assistance to the prisoner at the time of his recidivist trial.

Next, the Fourth Circuit points out that counsel made

no attempt to determine the identity of or to interview the prosecurix's male companion. This is true. The Court ignores, however, the very simple fact that it would have been impossible for Dupuy to have located said witness.

The Fourth Circuit points out that "Counsel for an indigent defendant should be appointed promptly." This was done in this case. The Court points out that counsel should be afforded a reasonable opportunity to prepare a defense. Here, it is quite clear that there was ample time to prepare a defense, and an effort was made to ascertain the prisoner's mental condition.

Again, the Court says, "Although counsel for petitioner were appointed over three weeks prior to trial, the delay of almost three months in the appointment and the fact that they were appointed to represent such a great number of other defendants to be tried at a forthcoming term of court constitutes a colorable fact." This statement is clearly unsupported by the record as hereinbefore pointed out. Moreover, in a footnote immediately following the quoted statement, the Court suggests that there are three or four terms of court annually in the Hustings Court of the City of Richmond. From whence came this suggestion is unknown. The Hustings Court of the City of Richmond has a term of court each month during the year except during the months of August and September, as provided for by the provisions of § 17-155 of the Code of Virginia, and the same is set forth below for the convenience of this Court.

> § 17-155.—There shall be a term of the Hustings Court and of the Hustings Court, Part Two, held for each month in the year, except the months of August and September. For the Hustings Court the terms for the months of January, February, March, April, May, June, July, October, November and December

> shall begin on the first Monday in each of such months; and for the Hustings Court, Part Two, the terms for such months shall begin on the second Monday in each of such months. Each term shall continue as long as the business of the court may require. Any cause or matter cognizable by the court may be heard and disposed of at any term thereof."

As can be seen, here again, the Fourth Circuit's opinion is premised upon facts which are not only not in the record but not true.

The court below says, "The record is clear that counsel did not explain the elements of the crime of rape to petitioner, especially the element of penetration." From a review of the record, we find that the same is silent with regard to this statement. The only evidence in the record is that Dupuy testified that he took all the time necessary to interview his client (Tr. 9).

Admittedly, the other public defender, Smith, testified that his recollection of his client's statement was that he was "trying" to have intercourse with the prosecutrix. This is true. The State court Judge, however, as he may, took the evidence of the attorney who had actually represented him at the time of the trial as a basis for his determination in the premises. This, of course, was most appropriate and should have been the end of the matter. 28 U.S.C., Section 2254, is controlling herein, and the same is set forth below:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency to the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce

that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the offfcial records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

Admittedly, counsel made no attempt to interview Carrie Herbert or to determine what her testimony would be. Her testimony, however, was that she heard a disturbance in the alley and called the police. She saw nothing. This omission of counsel makes little, if any, difference. Moreover, his failure to attempt to locate the unknown male companion of the prosecutrix is of little importance. No one suggested to Dupuy any way that he could locate this purported witness. At the State habeas proceeding Dupuy testifed as follows relative to this phantom witness:

"I didn't make any investigation because he (Coles) didn't know who he was. Nobody that I knew heard anything about him, and I might as well have gone to India to pick out somebody."

The foregoing constitutes a detailed summary of the errors in the court's opinion. We would point, however, to

the fact that the court below has, on the basis of the record before it from the State court, held that the burden is now on the Commonwealth in such a proceeding to prove a lack of prejudice. This is not the law. This Court has repeatedly held that the burden of proof is upon the prisoner.

In *Johnson* v. *Zerbst,* 304 U.S. 458 (1938), this Court placed the burden upon the petitioner in the habeas corpus proceeding as follows:

> "It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without Counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel. If in a habeas corpus hearing, he does meet this burden and convinces the court by a preponderance of evidence that he neither had Counsel nor properly waived his constitutional right to Counsel, it is the duty of the court to grant the writ." (304 U.S. 468)

In *Walker* v. *Johnston,* 312 U.S. 270 (1941), the Court pointed out that in the habeas corpus proceeding, the prisoner at a hearing "would have the burden of sustaining his allegations by a preponderance of the evidence." (312 U.S. 287)

In *Hawk* v. *Olson,* 326 U.S. 271 (1945), this Court pointed out: "Petitioner carries the burden in a collateral attack on a judgment. He must prove his allegations, but he is entitled to an opportunity." (326 U.S. 279)

In *Darr* v. *Burford,* 339 U.S. 200, this Court pointed out

that the burden is "on the accused to allege and prove primary facts, not inferences, that show, notwithstanding the strong presumption of constitutional regularity in State judicial proceedings, that in his prosecution the State so departed from constitutional requirements as to justify a Federal court's intervention to protect the rights of the accused." (339 U.S. 218)

A review of the foregoing decisions of this Court reveals that it has historically been held that the burden is on the prisoner in a habeas corpus proceeding to prove his case by a preponderance of the evidence and that there is no shift in this burden of proof. Here, the Fourth Circuit Court of Appeals has so departed from the teachings of this Court in this case that the same should be reversed.

It is interesting to note that the decision of the court below is in conflict with not only its own decisions but the decisions in other circuits. Let us first examine the decisions of the Fourth Circuit in this field. In *Root* v. *Cunningham,* 344 F.2d 1 (4th Cir., 1965), the Court said, "Moreover, it may be said that, while a defendant is undeniably entitled to a fair trial accordingly to the law of the land, yet he is not guaranteed a perfect one, and where an attorney gives his client his complete loyalty and serves his cause in good faith and to the best of his ability, the due process requirement for effective assistance of counsel is generally met."

With regard to the question of the available time prior to trial, the Fourth Circuit said in *United States* v. *Ray,* 351 F.2d 544 (4th Cir., 1965), "There can be no predetermination of the length of time needed by court-appointed counsel to prepare for trial, since the requirements will vary greatly. And what may be a reasonable time in one case, could be quite unreasonable in another."

In this case, it is suggested that the attorney should have in fact fabricated a defense when he knew that his client had admitted having intercourse with the prosecutrix. This is contrary to the Fourth Circuit's opinion in *Jones* v. *Cunningham,* 313 F. 2d 347 (4th Cir., 1963), wherein the Court said, "Of course, it is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make inquiries, to determine whether valid ones exist." Here, the attorney had no reason to believe there was any available valid defense.

The Court places great emphasis on the fact that the attorney failed to ascertain the previous chaste character of the prosecutrix. The Court points out that there is no evidence to show that she was of unchaste character but yet hinges its opinion on the failure of the attorney to make the investigation. This is contrary to its opinion in *Horne* v. *Peyton,* 356 F. 2d 631 (4th Cir., 1966).

As can be seen, the opinion of the court below is in conflict with its opinions.

The United States Court of Appeals for the First Circuit in *Sanchez* v. *United States,* 256 F. 2d 73 (1st Cir., 1958), as well as the District of Columbia Circuit Court of Appeals in *Edwards* v. *United States,* 296 F. 2d 707 (D.C. Cir., 1958); *Gray* v. *United States,* 299 F. 2d 467 (D.C. Cir., 1962); and *Mitchell* v. *United States,* 259 F. 2d 787 (D.C. Cir., 1958), follow the decisions of this Court, holding that the burden is on the prisoner to prove his case by a preponderance of the evidence.

The Second Circuit Court of Appeals in *United States* v. *Reincke,* 341 F. 2d 977, 981-982, stated the general rule applicable to a proceeding of this kind:

> "... The constitutional requirement of the effective assistance of counsel does not require that subsequent

examination disclose that every conceivable avenue of evidence has been totally explored and every possible theory of defense has been pursued to judgment. Proof of inadequacy of counsel has in this circuit been held to a stringent standard. We have repeatedly said,

> 'A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.'"

Likewise, the Fifth Circuit Court of Appeals in *Williams* v. *Beto,* 354 F. 2d 698 (5th Cir., 1965); the Sixth Circuit Court of Appeals in *Schaber* v. *Maxwell,* 348 F. 2d 664 (6th Cir., 1965); the Seventh Circuit Court of Appeals in *United States* v. *Dilella,* 354 F. 2d 584 (7th Cir., 1965); the Eighth Circuit Court of Appeals in *Taylor* v. *United States,* 282 F. 2d 16 (8th Cir., 1960); the Ninth Circuit Court of Appeals in *Reid* v. *United States,* 334 F. 2d 915 (9th Cir., 1964); and the Tenth Circuit Court of Appeals in *Nutt* v. *United States,* 335 F. 2d 817 (10th Cir., 1964), have all followed this Court's rule as to the burden of proof. Moreover, in all of the cited cases, the courts have held repeatedly that effective assistance of counsel does not mean successful assistance of counsel. It means only that the attorney apply himself in the manner he knows best employing the appropriate judgment and his experience in defending his client. Here, it is manifest that this was done.

Lest there be no confusion, it is manifest that had Dupuy known of the medical report, he should have sought a copy of the same. There is no evidence in the record to support the majority opinion in the court below that every practicing lawyer knew that it was the uniform practice of the Richmond Police Department to have such a medical examination made after a charge of rape had been filed. Moreover,

it is clear that Dupuy, had he known of this, would have sought such a report by his testimony. The medical report in and of itself would not have been of great assistance at the time of the trial of the case, in view of the woman's testimony. The penalty for rape in Virginia is provided by § 18.1-44 of the Code, and the same is set forth below for the convenience of the Court:

> "If any person carnally know a female of sixteen years of age or more against her will, by force, or carnally know a female child under that age or a female inmate of any hospital for the insane, who has been adjudged a lunatic, or any female who is an inmate or pupil of an institution for deaf, dumb, blind, feeble-minded, or epileptic persons, he shall, in the discretion of the court or jury, be punished with death, or confinement in the penitentiary for life, or for any term not less than five years. But if such female child be between the ages of fourteen and sixteen years and not an inmate or pupil of such institutions hereinbefore mentioned, and consents to the carnal knowledge, the punishment shall be confinement in the penitentiary not less than one nor more than twenty years."

The penalty for attempted rape is found in the provisions of § 18.1-16 of the Code, and the same is also set forth below for the convenience of the Court:

> "Every person who attempts to commit an offense which is punishable with death, shall be confined in the penitentiary not less than one nor more than twenty years, except that attempts to commit rape, other than rape not punishable with death, shall be punishable with death or, in the discretion of the jury or the court trying the case without a jury, by confinement in the penitentiary for life or for any term not less than three years."

Here, it is quite clear that the penalty for both rape and attempted rape in Virginia is the same and that the prisoner could have received the death penalty under the circumstances.

It is submitted that the dissenting opinion of Judge Craven correctly states the law applicable to a case of this nature. Judge Craven points out that Dupuy was of opinion, based on his client's testimony, that he had intercourse with the victim, that his failure to interview the witness who heard the screams and who saw nothing was immaterial, and that it was in fact ridiculous to suggest that he should try to locate this unknown witness. Judge Craven pointed out quite clearly that counsel had made no investigation of the reputation of the prosecutrix for chastity. He points out, however, that the record is bare of any suggestion that there was any evidence available then or now which would have tended to present her in a bad light. There is no evidence to show that Coles was prejudiced by any of the acts of commission or omission of Dupuy. It is quite clear that if there is evidence of unchaste character of the prosecutrix, it should have been presented by the petitioner. If this had been proven, there can be no question but that his case would be clearer in his behalf. Without such evidence, it is manifest that the decision of the court below is incorrect and contrary to this Court's decisions in similar cases.

While the shifting of the burden of proof to the Commonwealth by the Fourth Circuit is unsupported in law, its decision to cause the issuance of the writ without granting the State an opportunity to present evidence in this regard is clearly in error. The court below has in effect changed the rules of the game while the same is in progress and effectively denied to the people of the Commonwealth of Virginia the right to prove a case, which the court says

she must now prove. There is no precedent for a decision of this nature, and it is submitted for this reason that the judgment of the court below should also be reversed.

CONCLUSION

Your petitioner has demonstrated clearly and concisely that the court below has departed from the established teachings of this Court in cases of similar nature. Its decision is contrary not only to the decisions of this Court but to the decisions of other courts in its evaluation of that which constitutes the burden of proof and ineffective representation by counsel. Moreover, by its decision it has changed the rules of evidence and then denied to the Commonwealth her right to prove a case which the court says now must be proven.

For these reasons, it is respectfully submitted that the writ of certiorari should be granted and this case reversed.

Respectfully submitted,

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Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Reno S. Harp, III, an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 5th day of April, 1968, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the Judgments of the United States Court of Appeals for the Fourth Circuit by first class mail to S. Strother Smith, III, Esquire, Attorney at Law, 212 East Main Street, Abingdon, Virginia 24210, counsel for the respondent herein.

RENO S. HARP, III
Assistant Attorney General of Virginia

APPENDIX I

[LETTERHEAD OMITTED]

May 21, 1965

Curtis R. Mann, Esquire
Assistant Attorney General
Supreme Court Building
12th and Broad Streets
Richmond, Virginia

Joseph S. Bambacus, Esquire
Attorney at Law
418 Mutual Building
Richmond, Virginia

Re: Alfred Coles

v.

C. C. Peyton, Superintendent
Virginia State Penitentiary

Gentlemen:

Petitioner bases his claim to relief on the failure of his assigned counsel to initiate certain investigations in connection with this trial. That such omissions constituted inadequate representation of his interest.

The Court would concur that the allegations taken in the abstract, without consideration of the attendant facts and circumstances, affords strong support to the claim of inadequate representation.

In Turner v. Maryland (318 F2d 852), while it held that counsel's inaction would normally constitute inadequate assistance, yet where the defendant's guilt is otherwise clearly shown and out of the defendant's mouth, there is no support

for holding the legal representation was so inadequate as to warrant the invalidation of his conviction and sentence.

See also: Jones v. Cunningham 313 F2nd 347; Edgerton v. State of North Carolina 315 F2nd 676.

Considering the present case, in the light of the evidence, the Court does not feel that the petitioner has shown that an investigation would have disclosed favorable matter in his defense or produced beneficial results; or that prejudice to his case resulted.

He had admitted to his counsel he had had intercourse with the complainant; her outcry brought police to the scene and; he had actually been caught "with his pants down."

In view of the attendant circumstances, it is difficult to relate counsel's omissions to the finding of guilt. The severity of the punishment was certainly not the fault of counsel but rather his previous bad conduct. Here also the defendant failed to cooperate and advise counsel of that record.

The requirement of the Fourteenth Amendment to the Constitution of the United States is for a fair trial. Massey v. Moore 348 US 105, 108.

The Due Process clause "prohibits the conviction and incarceration of one whose trial is offensive to the common fundamental ideas of fairness and right." Powell v. Alabama 287 U.S. 45.

A decision whether demands of due process have been met requires a determination that upon the whole of the proceedings and attendant circumstances, there was a denial of fundamental fairness.

The Court is of opinion that the petition for relief should be denied.

Upon presentation, an order will be entered carrying the foregoing into effect.

Very truly yours,

/s/ SAMUEL B. WITT, JR.
Samuel B. Witt, Jr.

SBW/np

APPENDIX II

Order

This proceeding came on to be heard on April 12, 1965, upon the petition of Alfred Coles for a writ of habeas corpus and the answer of the respondent, the petitioner appearing in person and by his attorney, Joseph S. Bambacus, who had been appointed by this Court to represent him, and the respondent appearing by Curtis R. Mann, Assistant Attorney General.

Whereupon, the Court heard the evidence and argument of counsel and upon mature consideration thereof is of the opinion that, for the reasons stated in the Court's letter of May 21, 1965, the petition should be denied.

It is, therefore, ordered that the petition for a writ of habeas corpus be, and is hereby denied and dismissed, the writ discharged and the petitioner remanded to the custody of the Superintendent of the Virginia State Penitentiary, to all of which action of the Court, the petitioner objects and excepts.

It is further ordered that the Clerk of this Court forward a certified copy of this order to the petitioner, his

attorney, the respondent, and the Attorney General of Virginia.

Entered this 8 day of July, 1965.

/s/ SAMUEL B. WITT, JR.
Judge

I ask for this:

/s/ CURTIS R. MANN
Counsel for Respondent

Seen and objected to:

/s/ JOSEPH S. BAMBACUS
Counsel for Petitioner

APPENDIX III

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday *the* 8th *day of* March, 1966.

The petition of Alfred Coles for a writ of error to a judgment rendered by the Hustings Court of the City of Richmond on the 8th day of July, 1965, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and C. C. Peyton, Superintendent of the Virginia State Penitentiary, was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of

which is to affirm the judgment of the said hustings court, which court shall allow court-appointed counsel one hundred twenty-five dollars for services rendered on this appeal, his costs and necessary expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the said amount paid counsel appointed to represent him on this appeal, his costs and necessary expenses, the amount paid counsel appointed by the said hustings court to represent the said Alfred Coles therein, his costs and necessary expenses, and the costs to be assessed in this case by the clerk of the said hustings court.

A Copy,

Teste:

/s/ H. G. TURNER
Clerk

APPENDIX IV

Order

For reasons stated in the Memorandum of the Court this day filed, it is ADJUDGED and ORDERED that the writ of habeas corpus is denied and this petition is dismissed.

The Clerk is directed to return the state records after thirty days if no appeal is noted. If an appeal is noted, the Clerk is directed to retain the records pending final disposition of the case.

Let the Clerk send copies of this order and memorandum to the petitioner, respondent and the attorney General of Virginia.

JUL 7 - 1966

/s/ JOHN D. BUTZNER, JR.
United States District Judge

Memorandum of the Court

Alfred Coles' application for a writ of habeas corpus is denied and his petition is dismissed.

Coles was granted leave to proceed in forma pauperis. The respondent answered and tendered to the court the record of Coles' state habeas corpus proceedings in the Hustings Court of the City of Richmond.

Coles attacks a judgment of the Hustings Court of the City of Richmond entered November 27, 1963, which sentenced him to twenty-five years in the penitentiary upon conviction of rape.

Coles contends that he was denied counsel at his preliminary hearing, he was denied effective representation of counsel and that a report of the medical examination of the prosecutrix was not made available to him.

The court has examined the record of Coles' state habeas corpus petition, including the transcript and the letter opinion of the state judge dated May 21, 1965. The state court conducted a full evidentiary hearing, at which Coles was represented by counsel. After hearing evidence and argument, the state judge reliably made findings of historical fact and applied correct principles of law. *Cf. Vess* v. *Peyton*, 352 F.2d 325 (4th Cir. 1965), *cert. den.* 383 U.S. 953 (1966); *Dawson* v. *Peyton*, 359 F.2d 149 (4th Cir. 1966). He denied the writ.

This court concludes that another plenary hearing is unnecessary. *Townsend* v. *Sain*, 372 U.S. 293 (1963); *Duckett* v. *Steiner*, 332 F.2d 178 (4th Cir. 1964).

JUL 7 - 1966

/s/ JOHN D. BUTZNER, JR.
United States District Judge

APPENDIX V

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,817.

Alfred Coles,
Appellant,

versus

C. C. Peyton, Superintendent of the Virginia State Penitentiary,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND. JOHN D. BUTZNER, JR., DISTRICT JUDGE.

(Argued June 19, 1967. Decided January 8, 1968.)

Before SOBELOFF, WINTER and CRAVEN, Circuit Judges.

S. Strother Smith, III, (Court-assigned counsel) for Appellant, and Reno S. Harp, III, Assistant Attorney General of Virginia, (Robert Y. Button, Attorney General of Virginia, on brief) for Appellee.

WINTER, Circuit Judge:

Upon his claims that in his prosecution for forcible rape he was denied effective assistance of counsel at his trial,

that the Commonwealth of Virginia unconstitutionally suppressed vital and relevant exculpatory evidence and that, under the circumstances of this case, the absence of counsel at his preliminary hearing constituted a denial of counsel, Alfred Coles ("petitioner") appeals from the district court's denial of his petition for a writ of habeas corpus. The writ was denied, without plenary hearing, on the basis of the transcript of a state habeas corpus hearing.[1] We agree with the district judge that another plenary hearing was unnecessary, but we conclude that the writ should issue, conditioned upon a reasonable opportunity for the Commonwealth to afford petitioner a new trial.

On May 25, 1963, petitioner was arrested for forcible rape. The testimony at the state habeas corpus proceeding showed that petitioner claimed that, in a public street, the prosecutrix, with a male companion, offered her "services" for two dollars. He and the prosecutrix adjourned to an alley where an argument ensued with regard to the time of payment to the prosecutrix. A neighbor called the police and petitioner was arrested. The prosecutrix, on the other hand, testified that petitioner had "grabbed her and dragged her down the alley" and raped her. Immediately after petitioner's arrest, the prosecutrix submitted to a medical examination, the report of which stated that slides and swabs for the presence of spermatozoa and seminal stains were both negative.

Shortly after his arrest, petitioner was granted a preliminary hearing. Va. Code Ann. § 19.1-163-1 (1960 Repl. Vol.). It is undisputed that petitioner was not represented

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[1] Petitioner sought a writ of habeas corpus from the Hustings Court of the City of Richmond. After plenary hearing the writ was denied. The Virginia Supreme Court of Appeals denied a writ of error. Available state remedies were thus fully exhausted.

by counsel at the hearing. Counsel was not appointed until August 20, 1963, almost three months after petitioner's arrest, when Raymond H. Dupuy, Esq. and Robert J. Smith, Esq., public defenders, were appointed to represent petitioner and *fifty-seven other defendants in other felony cases* scheduled to be tried in the then current term of court.

Petitioner was tried, non-jury, on September 17, 1963, and his conviction, resulted in a sentence of twenty-five years. During the time between his appointment and the trial, Mr. Dupuy interviewed petitioner three times: once for as long as twenty minutes, again for a lesser period, and a third time briefly on the day of trial, just before the trial began. In the company of Mr. Dupuy, Mr. Smith was present during the first two interviews. He estimated the duration of the first interview to have been thirty minutes and the second something less. One of counsel for petitioner testified that petitioner admitted that he had had intercourse with the prosecutrix, and that an argument occurred between them whether he would pay in advance or upon completion of the act, and a woman who lived nearby had heard the commotion and called the police. Petitioner's other court-appointed lawyer testified that petitioner told his attorneys that he was *trying* to have intercourse with the prosecutrix, and that the events took place next to the house of Carrie Herbert, who heard the disturbance and called the police.[2]

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[2] The state habeas corpus judge accepted the testimony that petitioner had intercourse with the prosecutrix and, for reasons not disclosed, rejected the testimony that petitioner was *trying* to have intercourse with the prosecutrix. From this premise, he reasoned that petitioner was not prejudiced by the omissions of his counsel, described in the text. The district judge, in dismissing the application made to him simply stated that the state court judge "reliably made findings of historical fact and applied correct principles of law."

Included among the things that counsel admitted they did not do are the following: Counsel made no investigation of the reputation of the prosecutrix for chastity. Counsel made no attempt to determine the identity of, or to interview, the prosecutrix's male companion. Counsel made no attempt to interview Carrie Herbert or to determine what her testimony would be. Counsel did not explain the elements of the crime of forcible rape to petitioner, including the necessity of proof of penetration, and question him in regard thereto. In short, counsel did no more than interview petitioner on the three occasions previously alluded to and to accept the statements he made to them during the interview. Counsel were unequivocal that they did not know that the prosecutrix had been examined medically and that they had no knowledge of the written, signed medical report.

To support our conclusion that petitioner is entitled to a writ of habeas corpus, we need look only to the principles to be distilled from *Twiford* v. *Peyton,* 372 F.2d 670 (4 Cir. 1967); *Martin* v. *Commonwealth of Virginia,* 365 F.2d 549 (4 Cir. 1966); *Braxton* v. *Peyton,* 365 F.2d 563 (4 Cir. 1966); and earlier authorities, and apply them to the facts of this case. The principles may be simply stated: Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for

reflection and preparation for trial.[3] An omission or failure to abide by these requirements constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby.

Although counsel for petitioner were appointed over three weeks prior to trial, the delay of almost three months in their appointment and the fact that they were appointed to represent such a great number of other defendants to be tried at a forthcoming term of court constitutes a colorable fact.[4] Perhaps the burden of representing so many persons accused of felonies explains the woefully inadequate services rendered to petitioner. Whatever the reason, the services of counsel were ineffective in at least several regards.

The record is clear that counsel did not explain the elements of the crime of rape to petitioner, especially the element of penetration. If the recollection of one of petitioner's counsel was accurate that petitioner was "trying" to have intercourse with the prosecutrix, penetration may not have occurred, in which event, under Virginia law, the substantive crime would not have been committed. *McCall* v. *Commonwealth,* 192 Va. 422, 65 S.E.2d 540 (1951). Effective representation of counsel would require exploration of this possibility under the facts of the case.

Virginia law also interposes consent as an absolute bar to a prosecution for rape when the alleged victim is over

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[3] As we stated in *Jones* v. *Cunningham,* 313 F.2d 347, 353 (4 Cir. 1963), "* * * it is not for the lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist."

[4] The record does not disclose the precise duration of a term of court, but there is a suggestion that there are three or four terms of court annually, excluding any possible summer recess.

the age of consent, and previous want of chastity is relevant and probative evidence of consent. *Bailey* v. *Commonwealth*, 82 Va. 107 (1886); Va. Code Ann.§ 18.1-44 (1960 Repl. Vol.) Even if counsel were satisfied that lack of penetration was unavailable as a defense, effective representation would require some investigation of the reputation of the prosecutrix for chastity under the facts of this case, especially when petitioner's version of the incident, as understood by both of his counsel, was that he had an encounter with a common street walker Effective representation would similarly require some investigation to determine the identity of, and some attempt to interview, the male companion of the prosecutrix and some attempt to interview Carrie Herbert to ascertain if evidence to support a defense of consent could be uncovered. Similarly, some inquiry should have been made to ascertain if the prosecutrix were medically examined, not only because the report which was in existence would be proof supporting a lack of penetration,[5] but also because the report disclosed the identity of the medical examiners from whom inquiry could be made as to whether their examination disclosed the presence or absence of signs of physical violence on the person of the prosecutrix with its direct relevance to the question of consent.

These omissions and failures satisfy us, in the absence of affirmative proof or lack of prejudice, that petitioner was denied effective assistance of counsel and that he should be granted a writ of habeas corpus for his discharge unless the Commonwealth, within a reasonable period to be fixed by the district judge, affords him a new trial. In the light

[5] Virginia law does not require proof of emission as an element of the crime of rape, although it recognizes negative proof of emission as a strong circumstance indicating lack of penetration. *McCall* v. *Commonwealth*, 192 Va. 422, 65 S.E.2d 540 (1951).

of this conclusion, we need not discuss the contention that petitioner's rights were unconstitutionally impaired by the failure of the prosecuting authorities to disclose the existence or contents of the medical report to petitioner's counsel. In the event of a retrial, the existence and contents of the medical report are now disclosed, as are the identity of the examiners to whom further inquiry may be directed.

We add only that, even under the circumstances of this case, petitioner's contention that there was a fatal error in the failure to provide him with counsel at the preliminary hearing is foreclosed by our decisions in *Vess* v. *Peyton*, 352 F.2d 325 (4 Cir. 1965), *cert. den.* 383 U.S. 953 (1966), and *Ward* v. *Peyton*, 349 F.2d 359 (4 Cir. 1965).

Reversed and remanded.

CRAVEN, Circuit Judge, dissenting:

The court today puts upon the Commonwealth of Virginia what is to me a new and erroneous rule[1] as to burden of proof, not supported by prior decisions of this or any other circuit. Except for the shift in the burden of proof the court's decision that the performance of Cole's trial counsel was constitutionally ineffective would be demonstrably erroneous—which perhaps explains the expedient of adopting the new rule for this case. I do not suggest that courts are never justified in shifting burdens of proof. Where the facts are within the knowledge or reach of an adversary and not readily attainable by the other side, it is sometimes only just to do so. *Cf. Chambers* v. *Henderson*-

[1] The majority states the rule to be that failure to abide by certain "requirements" constitutes a denial of effective representation of counsel "unless the state * * * can establish lack of prejudice thereby." Whether the rule is correct or not depends upon what is meant by "requirements" as discussed *infra*.

ville Bd. of Educ., 364 F.2d 189 (4th Cir. 1966). But where that is not so I think federal courts should not tamper with well established state rules of procedure—absent some compelling reason not suggested in this record

Virginia has what may be termed a homemade version of a public defender system. Mr. Dupuy and Mr. Smith were designated public defenders for three terms of court extending over a three-months period and assigned the responsibility of representing 57 indigent defendants during those three terms of court. The practice of the Hustings Court of the City of Richmond was to appoint private counsel for a period of time. Both Mr. Dupuy and Mr. Smith interviewed Alfred Coles and other indigents assigned to their responsibility, but it was never contemplated that both would actually appear for him and represent him at his trial. Instead, it was the practice that Mr. Dupuy would represent a given indigent in one court while Mr. Smith would represent another one in another division of the court. Although the state court order authorizing the representation of indigents by Mr. Dupuy and Mr. Smith was entered on August 20, 1963, both Dupuy and Smith testified that they actually began their duties in June of 1963, and the record is clear that Coles was represented as early as June 13 when a motion was made to have a psychiatric examination made of him. Dupuy interviewed Coles twice prior to the trial and again on the trial date. Smith participated only in first two interviews. Dupuy represented Coles at the trial and Smith was not present.

I do not think the foregoing fact situation supports an inference that the system was constitutionally inadequate,[2] nor do I understand the court to so hold. Since Dupuy and

[2] Not that it is the best. *See generally*, ABA Project on Minimum Standards for Criminal Justice, Providing Defense Services (Tentative Draft 1967).

Smith, in effect, divided the load, the result is that each one had a trial burden of 28 or 29 criminal cases spaced over a three-months period in three different terms of court. Although a heavy burden, it does not seem to me to be one so heavy that it can be said that effective representation was impossible or even improbable.

As for Mr. Dupuy's conduct of the trial, the majority seems quite certain that he did those things he ought not to have done and left undone things that he should have done *to the extent that Coles was denied the right to counsel.* As shown below, such certitude is based in part upon relieving Coles of his proper burden of proof, thus enabling the court to implicitly assume some rather startling facts. I do not think the admitted imperfections, although serious, amount to a denial of counsel.

ERRORS AND OMISSIONS OF COUNSEL

(1) Counsel did not explain the elements of the crime of forcible rape to Coles, including the necessity of proof of penetration. But Dupuy testified that Coles, 28 years old, admitted to him "that he had had intercourse with the woman," and this testimony is uncontradicted.[3] Since the majority concedes in footnote 2 on page 3 that the state habeas corpus judge accepted this testimony, that should be the end of the matter. 28 U.S.C.A. § 2254 as amended

[3] Apparently Coles himself so testified at the trial and joined issue with the prosecuting witness on whether it was rape or prostitution. There is nothing to suggest an issue of penetration except the testimony of Smith, who disparaged his own notes, saying he could read them more clearly two years ago, but that "according to my recollection, his version was that he kept trying to do it, and that he was in the act of trying—whether or not there was any penetration, I don't recall whether he said or whether he even knew because my notes say here that he just kept trying to do it and that he was exposed." Coles also admitted to Witness Vann that he had intercourse with prosecutrix.

Nov. 2, 1966. The court concedes that counsel has no duty to fabricate a defense.

(2) Counsel made no attempt to interview Carrie Herbert or to determine what her testimony would be.[4] The record does not indicate that Mrs. Herbert testified to anything other than that she heard a disturbance and screams and called the police. It was dark in the alley near Mrs. Herbert's house and she apparently saw nothing. Since screams and a disturbance are as consistent with Coles' version as with the prosecutrix's version, Mr. Dupuy's omission does not seem to me to be of any consequence.

(3) Counsel made no attempt to determine the identity of, or to interview, the prosecutrix's male companion. Was there such a person? No one said so—except Coles—and he offered Mr. Dupuy no suggestion for finding him. Nor did Coles suggest to Mr. Dupuy the names of possible witnesses who might be subpoenaed. When Dupuy was asked at the state post-conviction hearing whether he made any investigation concerning this phantom[5] witness, he gave what seems to me to be a sufficient answer to exonerate him of ineffective representation:

> "I didn't make any investigation because he [Coles] didn't know who he was. Nobody that I heard of knew anything about him and I might as well have gone to India to pick out somebody."

(4) Counsel made no investigation of the reputation of the prosecutrix for chastity.[6] Unquestionably, representa-

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[4] The court's new burden of proof enables it to assume that her testimony would be favorable to Coles.

[5] Again the court's new burden of proof enables it to assume there was such a witness.

[6] Aided again by its new burden of proof, the court is enabled to assume the reputation was bad.

tion might have been more effective had such an investigation been made. It was not done and has not been done to this very hour.[7] But it is much easier for my brethren to suggest necessity for such an investigation than it is to make one. This is not a case where the defendant suggests to counsel the names of male persons who might be willing to testify to the prosecutrix's promiscuity. Indeed, the record is bare of any suggestion that there existed anyone who would give her a bad character. Under these circumstances, Dupuy's omission does not seem to me to be so gross as to amount to ineffective representation by counsel.[8]

The foregoing are the counts of the indictment leveled by the court against Mr. Dupuy. Without knowing whether *in fact* the petitioner Coles was prejudiced by Mr. Dupuy's omissions, I am unwilling to hold that Dupuy's representation was so woefully inadequate[9] as to amount to a denial by the state of Coles' right to counsel. I am unwilling to assume as the court does (by its technique of switching the burden of proof) that (1) Carrie Herbert's testimony would have been different and more favorable had she been interviewed before trial; (2) there *was* a male companion whose testimony would have been favorable; (3) prosecutrix's reputation for chastity was bad.

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[7] If this proves that Mr. Dupuy was ineffective, it would also prove the ineffectiveness of Coles' post-conviction hearing counsel (a different lawyer) —except for the court's switch of the burden of proof.

[8] The court seems to assume in regard to omissions (3) and (4) that a lawyer's duty of case investigation includes activity as a sleuth. I am aware of no such concensus of opinion, although it is true that Perry Mason sometimes acts as his own gum-shoe. I do not understand that we have before us the question of whether a state's duty to provide counsel may include a duty to provide an investigative staff. *See* ABA Project on Minimum Standards for Criminal Justice, Providing Defense Services 23 (Tentative Draft 1967).

[9] The usual standard is well stated in *Schaber* v. *Maxwell*, 348 F.2d 664, 670 (6th Cir. 1965).

Switching the burden of proof does not make these startling defenses true but it does put upon the state the exceedingly awkward, if not unbearable, burden of proving the negative. And it is not suggested that the state can prove the negative of such matters more easily than petitioner can prove the positive—the usual reason for switching the burden. Nor do these matters, in my opinion, fall within the category of constitutional defects that must be deemed inherently prejudicial because (1) we intuitively sense prejudice, and (2) the extent of it is simply not practicably susceptible to proof, such as (a) failure to have counsel assigned,[10] (b) appointment of counsel followed immediately by trial,[11] (c) division of responsibility among an entire bar (what's everyone's responsibility is no one's responsibility).[12] Except in such situations, and others of like kind, it is still true that "in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused." *Estes* v. *Texas*, 381 U.S. 532, 542 (1965). I think the correct rule is that the burden of showing lack of prejudice falls on the state when, *but only when*, the petitioner has shown a set of facts that demonstrate prejudice to his defense, inherently or otherwise.

I do not read the court's opinion as charging to Dupuy his ignorance of the existence of the medical report of the examination of prosecutrix. Apparently the majority shares my doubt that every "effective" lawyer in Richmond knew or should have known, prior to this case, that it was the uniform practice of the Richmond Police Department to

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[10] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[11] *Twiford* v. *Peyton*, 372 F.2d 670 (4th Cir. 1967); *Martin* v. *Virginia*, 365 F.2d 549 (4th Cir. 1966); *see also*, *Turner* v. *Maryland*, 318 F.2d 852 (4th Cir. 1963).

[12] *Powell* v. *Alabama*, 287 U.S. 45, (1932).

have such a medical examination conducted of every woman who claimed to have been raped. Had Mr. Dupuy known of the report, I think it only fair to him to suggest that he would then have felt justified in raising a defense of non-penetration in spite of the admissions made to him by his client and apparently repeated in open court.

In *Cardarella* v. *United States*, 375 F.2d 222 (8th Cir. 1967), the prisoner urged that he was entitled to a new trial because his lawyer should have known of or discovered the existence of certain police reports. In dismissing the contention, the court said: "Even so, 'lack of diligence' in discovering evidence which was not used at the trial is not necessarily to be equated with ineffective assistance of counsel. Perfect or errorless counsel is not required as a prerequisite to a fair trial constant with due process." *Id* at 232.

If the medical report is deemed to be exculpatory, and certainly its thrust is in that direction, and if the state suppressed or withheld it, there would appear to have been a violation of due process sufficient to require a new trial. See 21 Am.Jur.2d *Criminal Law* § 225. But the court quite properly does not reach that question for it was not presented to the state habeas corpus court, nor was error in that respect assigned on appeal to the Supreme Court of Appeals of Virginia.[13]

Although I agree that we should not grant relief on a sufficient ground not presented to the state courts, I cannot but regret that we do not, at the very least, postpone decision to afford the Virginia courts the opportunity to consider this question. I strongly suspect that if we waited there would then be no occasion for today's decision which makes it seem to me even more unjustifiable.

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[13] The brief on appeal is said to have mentioned it.